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Virgil H. Camp v. Deseret Mutual Benefit Association : Brief of Respondents

Utah Supreme Court

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Dan S. Bushnell; Bruce Findlay; Attorneys for Respondent;

VIRGIL H. CAMP,

Plaintiff-Appellant,

vs.

DESERET MUTUAL BENEFIT ASSOCIATION, et al.,

Defendants-Respondents.

* * * * * * * * * * *

BRIEF OF RESPONDENTS

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
JUDGE JAMES SAWAYA

* * * * * * * * * * *

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IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * * * * * *

VIRGIL H. CAMP, Plaintiff-Appellant,	)	
vs.	)	Civil No. 15,672
DESERET MUTUAL BENEFIT ASSOCIATION, et al., Defendants-Respondents	)	

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STATEMENT OF THE CASE

Plaintiff sued to obtain judgment that a certain van was "medical equipment" under an insurance certificate provided by the defendants.

DISPOSITION IN THE LOWER COURT

At the trial, the matter was submitted on certain agreed evidence and the court, the Honorable James S. Sawaya, gave judgment for defendants.

RELIEF SOUGHT ON APPEAL

Defendants seek an order affirming the judgment below.

STATEMENT OF FACTS

The plaintiff's teenage son, Jeff Camp, suffered a neck injury in 1976 while jumping on a trampoline. As a result of the injury, Jeff is now paralyzed completely up to the level of the nerves from the sixth or seventh cervical vertebrae, which means that he has no voluntary control of his legs or torso, and that his arms and

shoulders are disabled, although some function remains. As a dependent of the plaintiff, Jeff had health insurance under a certificate of insurance issued by Deseret Mutual Benefit Association by virtue of the plaintiff's employment as an insurance agent associated with Beneficial Life Insurance Co. The certificate of insurance under which Jeff was covered provided benefits in relevant part as follows:

> TYPE II BENEFITS
>
> Benefits are payable for expenses incurred by you or your dependent resulting from bodily injury or sickness on the basis of 80% of usual, reasonable and customary charges for:
>
> . . . .
>
> 6. MEDICAL SUPPLIES AND EQUIPMENT--charges for medical supplies and medical equipment prescribed by a physician including oxygen; blood and other fluids to be injected into the circulatory system; artificial limbs and eyes; casts, splints, trusses, braces, orthopedic shoes, crutches, surgical dressings; and rental of special medical equipment recommended by a physician such as a wheelchair, hospital type bed, iron lung or oxygen equipment.
>
> 7. AMBULANCE--charges for room and board incurred while confined in an Extended Care Facility, provided such confinement is for treatment of an acute illness or injury, commences within five days after discharge from a hospital and such confinement is recommended by a physician for purposes of convalescing from such bodily injury or sickness. Custodial care is ineligible for benefit.
>
> . . . .
>
> 12. TRANSPORTATION--charges for necessary transportation by railroad or regularly scheduled airline to and from the nearest facility equipped to furnish necessary medical treatment not otherwise obtainable. [Insurance certificate, Exhibit A to the complaint, at 14-16, R 20-21]

The term "custodial care", mentioned in subpart 8 of the above excerpt from the certificate, is defined on page 51 of the insurance certificate as follows:

The term custodial care as used in this booklet means maintenance of a patient beyond the acute phase of injury or sickness. [R-38]

After the accident, Jeff spent about a month at Cottonwood Hospital and then was transferred to University Medical Center, where he stayed from late July, 1976, until his discharge on October 15, 1976. While at the University Medical Center, Jeff was under the care of a rehabilitative medicine team, including Dr. Pedro Escobar, his attending physician, a specialist in rehabilitative medicine; Jim Woolsey, a social worker; and others, including a psychologist, a physical therapist, and other doctors.

Some time prior to Jeff's discharge, plaintiff asked Woolsey, the social worker, and other members of the team about the care of Jeff which would be necessary when Jeff went home. A member of the team suggested that Dr. Escobar might recommend a specially-equipped van, to enable Jeff to travel about. Woolsey advised the plaintiff, however, that the expense of purchasing such a van would probably not be reimbursed by plaintiff's health insurance. The following ensued:

Q. (By Mr. Bushnell) It may be repetitious, but go ahead, answer.

A. (By Mr. Woolsey) Okay, that I was not sure if the insurance company would cover the purchase of a van and equipment.

Q. What did he [Mr. Camp] say to that?

A. Well, as I recall, he said, I think, that they, the insurance company, if they are not covering this kind of thing that they ought to and I would like to purchase it, to see. . . .

Q. Fine. And you are the one that put in Deseret Mutual where it says "Agency to be billed?

A. Right.

Q. You did that even though you weren't sure whether it was covered or not?

A. True.

. . .

Q. Why did you have these reservations in your mind as whether they would approve it or not?

A. Well because from experience here on rehabilitation, insurance companies, other insurance companies have not, you know, covered a vehicle, purchase of a car or a van for a patient. The only agencies that have done anything in that regard are the State Division of Vocational Rehabilitation who purchased some adaptive equipment for the patient, such as hand controls for the hydraulic lift, if the patient is a quadriplegic and they are approached as a last resort for financial help to get these things.

. . .

Q. Do you know of any instances where an insurance company has in fact approved and purchased a motor vehicle itself?

A. Not with my experience here, I haven't. [Woolsey deposition at 17-19.]

Later, when Jeff's discharge from the hospital was near, plaintiff prepared a form of letter for the signature of Dr. Escobar, recommending certain equipment for Jeff. The purpose of this letter was to support an insurance claim for the equipment plaintiff and his family would need to care for Jeff:

Q. [Mr. Bushnell] Is it fair, based on what you've said, to say then that you initiated the precise, specific request to the doctor for a letter prescribing the van so you could present it to the insurance company?

A. [Mr. Camp] Prescribing all the equipment, the answer is yes.

Q. Including the van?

A. Including the van. [Deposition of Camp at 18.]

In response to plaintiff's request, Dr. Escobar wrote a letter, dated October 11, 1977, in which he lists the equipment which -

> [W]ill be absolutely essential in order for Jeff to function as independently as possible.
>
> 1. A van equipped with power steering . . . and an automatic wheel chair lift.
>
> 2. A standard wheelchair
>
> 3. An automatic hospital bed . . .
>
> 4. A large tire commode chair . . .
>
> 5. A bath shelf . . .
>
> (Exhibit D-1, deposition of Escobar)

Plaintiff later filed his claim with DMBA and was reimbursed for all of the items mentioned in Dr. Escobar's letter, except for the specially equipped van, with respect to which the company denied his claim. Thereafter, plaintiff filed this suit.

Defendants took the depositions of Camp, Woolsey and Escobar during the pendency of this action. Dr. Escobar testified that there was no medical necessity for the van; he stated that:

Q. [Mr. Bushnell] It is true that the van is not for medication or for treatment of any physical condition of the plaintiff?

A. [Dr. Escobar] Yes, sir.

Q. It is just what it purports to be-- transportation.

A. To the hospital, to school.

Q. It is not like braces, and other things that you have to have with reference to bodily function; it is for transportation?

A. Yes, sir.

Q. You have emphasized, however, that having the availability of a van does serve the emotional needs of the patient?

A. Yes, sir.

Q. You don't expect the van to be of any assistance so far as rehabilitation physically is concerned?

A. Of his physical condition, no, but it will permit him to pursue education.
[Deposition of Escobar at 56-57] (emphasis added)

Another objective of the van is to provide recreation. Deposition of Escobar at 63 line 22.

At the trial, it was stipulated that the deposition of Escobar, Camp, Woolsey and Stewart should be received in evidence, together with the exhibits to the complaint and affidavits of Lorin Miles and Stewart. The effect of the stipulation was to allow the trial court to weigh the evidence, rather than be restricted by the rules applicable to summary judgment. (R-322) After hearing argument, the trial court ordered that judgment enter for defendants, finding as a matter of fact and law that the requested equipment was not "medical equipment" as provided by the contract. (R 131-33)

POINT I

THE MERE RECOMMENDATION BY A PHYSICIAN OF EQUIPMENT FOR A PATIENT DOES NOT MAKE THE EQUIPMENT MEDICAL IN NA RE.

The insurance contract relied upon by the plaintiffs refers to "special medical equipment" (in contrast with Kennen v. Equitable Life Assurance Society of the United States, 59 Misc. 2d 536, 299 N.YS.2d 880 (1969), which referred to "equipment", a broader term than the phrase "medical equipment"). Several cases have considered the meaning of the adjective medical in the context of services or equipment recommended by a physician. The most recent of these, Savaria v. DiSano, 373 A.2d 820 (R.I. 1977) considered a claim of a disabled employee who sought to be provided with an electric wheelchair and an automatic elevator. The court sustained the Rhode Island workmen's compensation commission's order granting the wheelchair and denying the elevator. The employee's physician had remarked with respect to the elevator that it would give the employee some change of environment and a measure of safety in moving about. On the other hand, however, the physician stated that the employee's health would not be improved nor his mobility increased. The workman's compensation commission reasoned in denying the elevator that it would not relieve the effects of the injury but that the elevator was rather more a convenience item. In sustaining the Workman's Compensation Commission the court reasoned,

> In short, it is not enough that the means used to relieve the employee from the effects of the injury have been prescribed by his physician to be chargeable to the employer under the statute, they must be medical in nature as well. . . . In this case . . . the benefit is indubitably convenient and perhaps even necessary to relieve the employee from the effects of his injury but there is nothing in this record that compelled the commission to conclude that in the circumstances described the elevator or lift was medical in nature. 373 A.2d at 820, 822. [emphasis supplied]

In a similar case, Lutman v. American Shoe Mach. Co., 151 S.W.2d 701 (Mo.App. 1941) the question was whether a physician had treated the plaintiff for an injury within a period of limitations. The court held that the doctors recommending to the patient that he wear a mask to protect him from dust was not medical treatment. The court reasoned as follows:

> As to Dr. Reuter's advice that the respondent be taken off the work in question or be given a mask to wear 'if the dust was aggravating him', we do not believe it can reasonably be said that such advice was 'medical treatment.' It is not even suggested that medicine or drugs were advised or given by the doctor. It certainly was not surgical treatment' or 'hospital treatment'. Furthermore the advice was not given to cure and relieve the effects of the injury but was for the purpose of preventing future aggravation thereof. The grouping of the words "medical, surgical and hospital treatment" by the legislature shows plainly what the lawmakers had in mind and clearly does not include mere diagnosis, nor can it be said to include advice that could be given by a layman. The above words not being of a peculiar or technical nature 'shall be taken in their plain and ordinary and usual sense.' 151 S.W.2d 701, 709 (emphasis added)

The provision of a automobile vehicle such as a van to the plaintiff's son, Jeff, is like the advice given by the doctor to the plaintiff Lutman, that Lutman should wear a face mask or

working around dust. There is no special medical knowledge involved in the recommendation in either case; for Jeff a van is certainly a source of independence, convenience, and recreation but that is exactly the function that automobiles provide for all of us.

A Texas court considered the question of what is "medical" in Red v. Group Medical and Surgical Service, 298 S.W.2d 623 (Tex. Civ. App. 1957). A child who had suffered from spinal meningitis was rendered deaf by the disease. The attending physician recommended that the child be entered as a student at the Houston School for Deaf Children. The plaintiff sought to obtain a court order that the matter was covered under a clause of the health insurance contract providing for payment of fees of "the attending physician and consulting physician and specialists to whom the patient may be referred". The court rejected the notion that a lip reading instructor was a specialist under the contract, stating,--

> We do not think that the educational, schooling, or training fees paid by plaintiff for teaching his son the new skill of lip reading fall within the insuring clause of the contract in that even though they be classed as professional fees of specialists, the policy still does not contemplate fees of other than medical or surgical specialists--certainly not those of educational instructors of any class.

The court remarked that part of its reasoning was based on the finding of the doctor as follows--

> The doctor testified that on his examination and diagnosis he found the hearing nerves completely

destroyed and that there was nothing he could do from a medical standpoint to cure the nerve condition and restore the hearing.
298 S.W.2d 623, 625, 626.

Dr. Escobar testified that the van recommended for Jeff would not improve Jeff's physical condition; rather it would serve to aid him in his education and recreation. As in the Red case, these objectives are not medical and therefore are not comprehended in the phrase "medical equipment".

POINT II

THE PLAIN MEANING OF THE INSURANCE CERTIFICATE DOES NOT INCLUDE AN AUTOMOBILE OR VAN, NOR DOES IT INCLUDE THE SPECIAL EQUIPMENT CLAIMED BY PLAINTIFF WITH RESPECT TO THE VAN.

Considered as an abstract proposition it is clear that an automobile or van or bus is not a medical apparatus or device. The old definition of "van", which is a contraction of the word "caravan," was "an enclosed wagon or motortruck used for transportation of goods or animals." Webster's New Collegiate Dictionary 1292 (1975). There is a more recent usage of the term "van" referring to a type of vehicle which was recently developed for use as a light truck, which is now used for personal transportation like an ordinary automobile. Even so the ordinarily understood function of a van or of an automobile is for transportation, for convenience, perhaps for recreation, perhaps for hauling goods, but not for any medical purpose. The plaintiff in Nallan v. Motion Picture Studio

Mechanic Union Local No. 52, 49 App. Div. 2d 365, 375 NYS 2d 164 (1975) reversed on other grounds, 40 NY 2d 1042, 360 NE 2d 353 (1976) sought to receive workmen compensation coverage for his transportation expense. The main point in which the case turned and which it was ultimately reversed was whether or not he was an employee of the union. A subsidiary point was however that the plaintiff was not entitled to be provided with an automobile. The court reasoned as follows:

> "A motor vehicle is not a medical apparatus or device within the scope of Section 13 of the Workmen's Compensation Law."

There are three cases in holding that under New York Workmen's Compensation Law an automobile is not a medical apparatus or device. Nallan v. Motion Pictures Studio Mechanic Union Local No. 52, supra, De Croix v. N. Sumergrade & Sons, 20 App. Div. 2d 735, 246 NYS 2d 852; and Carniato v. Wheeler Corporation, 7 App. Div. 2d 328, 183 NYS 2d 298. The Nallan case has some close analogies to the present case; in it the plaintiff was a paraplegic, and using his automobile, he was able to be partially active, to hold down a job and so forth. Notwithstanding the circumstances, the court rejected his claim for the automobile. The reasoning of the two prior cases, De Croix and Carniato, was that "the enumeration of medical aids expressed in this statutory form would under ordinary canons of construction exclude non-medical instruments such as a motor vehicle." De Croix v. N. Sumergrade & Sons, 20 App. Div. 2d 735 246 NYS 2d 852, 853, 1964.

The thinking of the New York workmen's compensation cases is somewhat like that in the Medicare regulations. The definition of medical equipment is given as follows therein:

> Durable medical equipment is equipment which (1) can withstand repeated use, (2) is primarily and customarily used to serve a medical purpose, (3) is generally not useful to a person in the absence of illness or injury, and (4) is appropriate for use in the home.
> . . . .
>
> Equipment Presumptively Medical. -- Items such as wheelchairs and hospital beds are presumptively medical in nature . . . .
>
> Equipment Presumptively Nonmedical. -- Equipment which is primarily and customarily used for a non-medical purpose may not be considered "medical" equipment for which payment can be made under Medicare. This is true even though the item has some remote medically related use. For example, in the case of a cardiac patient, an air conditioner might possibly be used to lower the room temperature to reduce fluid loss in the patient and to restore an environment conducive to maintenance of the proper fluid balance. Nevertheless, because the primary and customary use of an air conditioner is a nonmedical one, an air conditioner cannot be deemed to be medical equipment for which payment can be made." CCH Medicare and Medicaid Reporter paragraph 3144. (emphasis supplied)

A separate section of the same source mentions the word appliances.

> [A]ppliances which customarily serve a nonmedical purpose but which may serve a medical purpose in a specific case . . . may be considered as medical appliances only where (1) the physician's plan of treatment specifically includes the use of such appliances in connection with the patient's treatment regimen, and specifies any limitations which should be placed on the use of the appliance due to the patient's condition, and (2) the appliance may be expected to contribute meaningfully to the treatment of the

illness or injury or to improve the functioning of a malformed body member.
CCH Medicare and Medicaid Reporter paragraph 1467. (emphasis supplied)

Dr. Escobar specifically testified that the van will not contribute to the treatment of Jeff Camp's malady, insofar as his paralysis is concerned, nor will it improve the functioning of his disabled members. Deposition of Escobar at 56.

Under the reasoning of both the New York workmen's compensation cases and the Medicare regulations, it appears clear that there is no basis for including a van or automobile under the definition of medical equipment. Furthermore, the Medicare Regulations provide a basis for distinguishing between a wheelchair and an automobile. A wheel chair is "generally not useful to a person in the absence of illness or injury and . . . is appropriate for use in the home."

The insurance certificate in this case provides separately for certain covered expenses. These are listed as medical supplies, ambulance, extended care, and transportation, insofar as they are relevant to this case. Plaintiff has the duty to show that his claim is covered under one or more of these headings. In Urtado v. Allstate Ins. Co., 528 P.2d 222 (Colo. 1974), the insured had been driving a car owned by a relative, while the definitions in his policy excluded a car owned by a relative from its "non-owned" coverage. The court remarked, quoting from the opinion in the intermediate appeals court, --

> Definitions of terms used in the insuring clause frequently have the effect of defining, and therefore limiting, coverage. 528 P.2d 222, 223.

The court denied coverage. By setting out several heads of insurance coverage, the DMBA policy sets up a scheme defining, and in the sense of Urtado, limiting the coverage. It is not enough, to sustain a claim under the policy, to merely point to the overall nature of the insurance. For example, in Drumm v. Blue Cross of Northeast Ohio, 320 N.E.2d 713 (Ohio), the insured, Patricia, was sent to a special school for "milieu" therapy.

> The essential concept of "milieu therapy" is that everything that happens to the patient has a considerable psychological impact . . . . This court passes no judgment upon the validity or effectiveness of "milieu therapy" but because the Plan clearly covers only certain enumerated services and supplies, an award of the full charge for "milieu therapy" amounts to an impermissible judical extension of an insurance contract beyond the limits clearly established by the policy. Courts are bound by the unambiguous terms of an insurance contract and cannot enlarge or extend the contract by implication so as to embrace an object distinct from that originally contemplated by the parties. 320 N.E.2d 713, 716. (Emphasis added)

The policy under which Jeff is covered provides transportation expense and ambulance expense according to its provisions, and the policy does not cover the purchase of a motor vehicle for the beneficiary.

There is another interesting analogy raised by the Drumm case; in effect, the program of rehabilitative medicine conducted

by Dr. Escobar is a form of "milieu therapy", a treatment aimed at the whole personality of Jeff Camp, rather than just his paralysis. While the broad scope of this program is admirable, it is not insured by the insurance certificate now before the court, and to extend coverage to the van simply because the van is necessary as a part of this program is not justified by the language of the certificate, referring to medical equipment.

Another contractual provision bears on the treatment of the whole man; the certificate provides that custodial care is not covered. This raises the implication that "milieu therapy", which by its nature extends beyond the acute phase of an illness or injury, into the future, is not covered.

The objective of Dr. Escobar's recommendation of a van, that is the education, independence, recreation, and convenience of Jeff Camp, is more a question of maintenance than it is of acute care. A van is a machine which can replace a chauffeur, for example. This is illustrated by Borgmann v. Commissioner, 438 F.2d 1211 (9th Cir. 1971). The taxpayer, Borgmann, sought to establish that the salary of Mrs. Holtzmann, his housekeeper, was deductible medical expense. Her function was to summon aid when he was ill and to provide him with housekeeping services, doing things for him which may have overtaxed his weak heart. The housemaid's function --

> [D]id not require the special skills of a nurse or one trained in medicine.

The court also concluded that the housekeeping duties --

> [D]id not bear such a direct and proximate therapeutic relation to some physical or mental function or structure of the body as to constitute a deductible medical expense.

In Jeff Camp's situation the plaintiff seeks to obtain reimburseme for a C.B. radio, which has the same function as Mrs. Holtzmann the housekeeper--to summon aid in an emergency. Other equipment to be installed in the vehicle, notwithstanding that it may be necessary for Jeff or useful for him, is no more proximately related to Jeff's paralysis than was Mrs. Holtzmann's aid to Mr. Borgmann's weak heart, for purposes of determining whether these aids are "medical." There is no doubt that the policy would not cover the employment of a chauffeur or housekeeper for Jeff under the heading of Medical Equipment or under its other clauses; machinery purchased for the same purpose is also not covered.

The commonsense idea that transportation equipment is not medical, in the understanding of the reasonable man, is illustrat by Morris v. Fireman's Fund Insurance Co., 72 N.M. 395, 384 P.2d 465 (1963). The plaintiff and her daughter were injured while covered by a broad automobile medical policy which in very gener terms provided for coverage of medical expenses. A relative cared for them during part of their recovery, because no hospita was convenient to the office where the mother received her thera Later a certain amount was claimed for medical expenses on behal of the relative. The court reasoned that the policy did not

limit coverage to services performed by professionals or in institutions such as hospitals; the court disallowed, however, a sum requested to reimburse for transporting the daughter to school each day because the girl wore a cast on her leg due to the accident. The court stated--

> "This item is beyond the scope of the policy." 384 P.2d 465, 469.

The same reasoning applies to the policy here; transportation, whether made necessary by a cast on the leg or paralysis, is not a medical concern. Therefore the judgment should be affirmed.

POINT III

THERE IS NO AMBIGUITY IN THE DISPUTED PORTION OF THE CERTIFICATE

In his brief the plaintiff merely documents the existence of the dispute over the interpretation of the certificate, which does not necessarily establish that the certificate is ambiguous. Just because there is a controversy and the parties assert differing interpretations, it does not follow that ambiguity has been established. O'Meara v. American States Insurance Co., 148 Ind. App. 562, 268 N.E.2d 109, 110.

> Instruments are not rendered ambiguous due to the fact that the parties do not now agree upon the proper construction to be given them.
>
> Cole v. Ross Coal Co., 150 F.Supp. 808, 811 (D. W. Va.).

The brief of the plaintiff shows that there is actually considerable agreement between the parties about the meaning of

the contract. Like all contracts, an insurance policy must be viewed as a whole before it is concluded that there is an ambiguity in the policy.

There are authoritative statements to the same effect in Utah cases. For example, in Fawcett v. Security Benefit Assoc., 104 P.2d 214 (Utah 1940), the court reasoned,

> Even though a particular provision of a contract of insurance be susceptible of more than one meaning the construction of such provision more favorable to the assured will not be adopted if other provisions of the entire contract clearly resolve the ambiguity in favor of the contrary construction. 104 P.2d 214, 218.

The same principle is supported by Auto Leasing Co. v. Central Mutual Insurance Co., 7 Utah 2d 336, 325 P.2d 264 (1958) where the court was faced with a dispute over whether there was coverage of a newly purchased automobile intended to replace a covered automobile. The plaintiff argued that there was uncertainty in the contract and that therefore the contract should be construed in favor of coverage. The court stated however,

> But that rule has no application unless there is some genuine ambiguity or uncertainty in the language upon which reasonable minds may differ as to the meaning. That requirement is not satisfied because a party may get a different meaning by placing a forced or constrained construction on it in accordance with his interest. The test to be applied is: Would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with usual natural meaning of the words, and in the light of existing circumstances including the purchase of the policy. (emphasis supplied)

The court held coverage was not available. Similarly, in our case the plaintiff is contending that ambiguity is introduced into the policy because the injury of the Plaintiff's child is so all pervasive that it effects all his daily activities and that therefore his need for an automobile is different than that of an ordinary citizen for an automobile. Nevertheless, the net result of what the plaintiff is contending for would amount to a revision of the contract and would provide for coverage of transportation costs by means other than those provided in the contract.

Another case involving interpretation of an insurance contract was Marriott v. Pacific National Life Insurance Co., 24 Utah 2d 182, 467 P.2d 981 (1970) in which the court reasoned that before the contract could be interpreted, all of the language must be construed together and that in view of that reasoning the court rejected plaintiff's contention, that the death of the plaintiff's decedent implied that the plaintiff's decedent was "disabled" for the purposes of certain insurance. As a matter of interpretation, each clause of the contract lends meaning to the others. A term is not ambiguous if fair inferences from other parts give meaning to the questioned part. Fawcett v. Security Benefit Association, supra.

It is to be noted that a liberal interpretation of an insurance policy or contract does not necessarily imply that all doubts are to be resolved against the insurance company.

> To take the ordinary and obvious meaning of words and construe them in the light of surrounding facts is the fundamental rule of construction. When that fails, other so called rules which might be better be called expedients may be resorted to. National Optical Co. v. United States Fidelity and Guarantee Company, 235 P. 343 (Colo. 1925).

In construing a contract a court should look to the intentio of the parties and take the point of view of the average man. Handley v. Mutual Life Insurance Co. of New York, 106 Utah 184, 147 P. 2d 319.

In view of the foregoing authorities the insurance certifica in issue in this case is not ambiguous. The word "medical" as it is commonly understood does not include automobiles or other automotive vehicles such as vans. This common acceptation of the phrase "medical equipment" therefore implies that there is no dispute as to the interpretation of the phrase "medical equipment" which would detain reasonable men.

Furthermore, the objectives of the doctor in prescribing the van is not within those objectives covered by the policy. The insurance is for health, not for the independence or recreation of the insured. The court should not, of course, rewrite the policy to reach these uninsured objectives. The cas of Cotton States Insurance Co. of Atlanta, Georgia v. Diamond Housing Mobile Homes, 430 F. Supp 503 (Dis. of Ala. 1977) held that the scope of an exclusionary provision must be determined in light of the entire insurance policy. A rule requiring the interpretation of ambiguity in the favor of the insured does not sanction a perversion of the policy's language

Defendants contend that plaintiff's interpretation of the insurance policy is not based on sound principles. A review of the entire policy shows that transportation and custodial care expenses which are a substantial aspect of the van's purpose are covered by other portions of the policy in a manner which would not provide coverage for the expense of the van. The provision of a van is not a question of substituting for lost function of the body of Jeff Camp. Nobody ambulates or gets around naturally by van. The objective for providing for ambulation by wheelchair is a covered expense but the objective of providing a van is not. A reading of the insurance policy shows that it was never intended by the parties to provide coverage in a form now claimed by the plaintiff. It is not the function of the court to rewrite the policy or torture the meaning of the policy to extend such coverage at this time. Torrington Co. v. Aetna Casualty & Surety Co., 216 S.E.2d 547 (S.C. 1975).

POINT IV

PLAINTIFF HAS FAILED TO SHOW THAT HIS CLAIM IS WITHIN THE EXPRESS PROVISIONS OF THE CERTIFICATE AND THEREFORE HIS SUIT SHOULD BE DISMISSED.

The duty of the plaintiff in an insurance case is to show that his claim fails within the express provisions of the policy. First National Bank v. Maryland Casualty Co., 162 Cal. 61, 121 P. 321. This plaintiff has attempted to do by arguing a number of

cases. The first, Amicone v. Kennecott Copper Corp., 19 Utah 2d 297, 431 P.2d 130 (1967) is cited by plaintiff for the idea that DMBA, the defendant, is bound by the opinion of the insured's doctor. DMBA contends here, however, that the expense must be (1) one which is medically related and (2) one which is prescribed by a doctor, and that these two requirements are independent is shown by Point I of this memo. There is no provision in the Deseret Mutual Contract, as there was in Amicone, for the decisio of any doctor to be binding and therefore Amicone is not applicab to this situation.

Plaintiff's second point is to merely set forth the general proposition that insurance policies are construed, when ambiguity exists, in favor of the insured. Defendants contend that there is no ambiguity in this policy, that its plain language clearly excludes this claim of the plaintiff. Therefore, the principle that ambiguities are to be resolved in favor of the insured has no application here. Furthermore, the finding of the DMBA claims committee that the claim for the van was for transportation expen is clearly correct.

The case of State Farm Mutual Automobile Insurance Co. v. Jacober, 10 Cal. 3d 193, 514 p.2d 953 (1973) is merely cumulative authority on the principle that the contract ought to be interpreted in favor of the insured where ambiguity exists. Furthermore, Jacober concerned a contract which involved the interpretation of an exclusion clause. The issue in this case

is not exclusion, but rather the definition of the insurance.

The plaintiff makes a causation argument to define the word "medical". In effect, the definition of "medical" is "anything required by reason of the impairment of a person," as follows: Jeff is paralyzed, therefore, he needs a van to get around and therefore the van is a necessary consequence of his impairment, and is "medical". The mistake in this argument is that it is too all-inclusive. All people need to be independent, all people need recreation and all people of Jeff's age need to travel to school and for these purposes it is convenient for them to have an automobile or a van. The plaintiff's son, Jeff, wants an automobile or the doctor recommended an automobile for him for the same reasons that anyone would buy an automobile, that is, for convenience to get around, to be independent, to enjoy recreation, and so forth. These purposes, however, are not medical when they are considered with respect to everyone else, all the normal members of the community, and they are not medical with respect to Jeff. The van will lessen Jeff's dependence upon the kind of services normally classed as custodial care, that is, lifting him in and out of vehicles, chauffeuring him around, calling for help in emergencies, and so forth. These are not covered under the contract, however. It is an oversimplification to say that because Jeff finds a van convenient and because it reduces the impact upon his life of his impairment that the van is therefore medical.

It should also be mentioned that in Fassio v. Montana Physicians Service, 553, P.2d 998 (Mont. 1976) the question was whether the defendant should pay for certain services of a physician which were condemned by the medical community as experimental. The dispute, in effect, in Fassio was between good and bad medicine. The question was not whether it was medical or not, but whether it was good medicine. Thus the Fassio case does not speak to the main issue of this case, to wit, whether or not an automobile can be considered as an item of medical expense.

CONCLUSION

The following points should be emphasized: (1) plaintiff supplied the motive and impetus for preparing the doctor's recommendation of the van in a form which, when submitted to the insurance company, would look like a prescription; (2) The Plain has failed to argue, in his brief, that the function of the van, as it is to be used by Jeff, is medical rather than recreational, educational or social; (3) Defendant DMBA contends that a van is not medical, and it has formulated its rates on the supposition that a van is not covered; to hold otherwise would open the door to many similar articles and would injure the company in its eff to hold the line against higher prices and premiums; and (4) Plaintiff has failed to cite any direct authority supporting his claim.

Dr. Escobar stated, on page 58 of his deposition, that the only contact he had with plaintiff had to do with the preparation of an insurance claim.

> Q. (Mr. Bushnell) Primarily, then, that was one conversation when Mr. Camp came to you alone, gave you a sheet of paper with some items on it and said, "I would like to have this letter to present to the insurance company and I would like you to specify what is the best equipment available for use for my son considering his condition?
>
> A. (Dr. Escobar) Yes, Sir.

At the deposition of Jim Woolsey, Jeff's social worker, testimony was given confirming that plaintiff gave the impetus for preparing the requisition for the van in a form to be submitted to the insurance carrier.

> Q. (Mr. Bushnell) No, Mr. Camp in his discussions, had he said, "If this can qualify as medical equipment, that means it is probably covered. If I could get a requisition to present to the insurance company I can get them to review it." Anything like that?
>
> A. (Mr. Woolsey) Yes . . . .
>
> Q. So is it correct to summarize your testimony that the requisition was made at the request of Mr. Camp to present to the insurance company to see whether they would or would not approve it; is that right.
>
> A. Well, that is true throughout the consultations with the doctor.
>
> Q. But he indicated that he wanted you to requisition, he wanted the staff, the department, the doctor, to recommend the van as being the best equipment for his son?
>
> A. Right . . .

Q. Did you have more than one discussion with Mr. Camp about this?

A. Yes. Like I mentioned before, it seemed like we had several conversations, you know, getting close to the time of discharge, "What are all of the things that Jeff would be needing so he could pursue his life," transportation being a great necessity for Jeff to continue with, you know, pursuing school, that kind of thing.

Q. You said several conversations?

A. Yes

Q. Would you say that is three, four . . . or what?

A. Half a dozen.

Q. And would most of these have taken place prior to the preparing of the document previously mentioned?

A. Yes.

Q. And in those you had specific discussions about the van on more than one occasion?

A. Yes.

Q. Then did you talk to the doctor on more than one occasion about the van?

A. Yes.

Q. How many times would you say you talked to the doctor about it?

A. I would say maybe three or four times. [Deposition of Woolsey at 32-34.] (Emphasis supplied)

Earlier in this memorandum defendants set out the language of the plaintiff when he was asked about the preparation of the prescription of the van--

Q. [Mr. Bushnell] Is it fair, based upon what you've said, to say then that you initiated

the precise specific request to the doctor for a letter prescribing the van so you could present it to the insurance company?

A. (Mr. Camp) Prescribing all the equipment, the is yes.

Q. Including the van?

A. Including the van.
[Deposition of Camp at 18] (Emphasis supplied)

The foregoing testimony shows, therefore, that the prescription prepared by Dr. Escobar was motivated by plaintiff's request for it, in order to test the insurance policy, rather than exclusively by the doctor's judgment as to whether the van was medical. The doctor testified, of course, that the function of the van was for transportation, for education, for recreation--but not for the medical needs of Jeff. The van, according to the doctor, is not a treatment of any physical condition of Jeff's, nor is it, like a wheelchair, helpful for Jeff to get around the house and take care of his body functions, going to the bathroom, eating, having a shower, and the like. It is for transportation, and that is why plaintiff's claim was denied by DMBA.

The rates of DMBA health coverage are set based upon anticipated payments on behalf of members. In setting these rates, the company must consider its experience, the scope of the coverage, and trends in health care prices. It is common knowledge that such prices are now rising rapidly. The premiums which have been in force have been based upon the assumption that items like automobiles and other transportation equipment are not

covered as "medical equipment". If the court were to order the company to pay the claim in this case, the result would be an upset of these calculations and loss to the company resulting in increased premiums to members. The risk is particularly great because of the amount of expense involved in a van costing $10,000.00, or perhaps for the rental of an air-conditioned apartment needed by a patient to provide him with "independence," or to buy a patient a typewriter or even stenographic services, to help him with his education, or perhaps to buy him a specially equipped snowmobile, to help with recreation. The conclusion is that a motor vehicle, not being medical in nature, is not covered.

Plaintiff's argument is limited in scope. Not having any authority, apparently, for the proposition that a motor vehicle is medical in nature, he argues that it is logical to consider a van as medical. The law, however, proceeds on a different principle. As Justice Holmes of the United States Supreme Court once wrote, "A page of experience is worth a volume of logic." Plaintiff's argument shows no experience, no authority. Plaintiff relies on the serious injury Jeff has suffered, and its all-pervasive effects on his life, to transmute in the court's mind an ordinary motor vehicle, useful for transportation, into medical equipment. This court should resist such arguments and affirm the judgment of. Elton v. Bankers Life & Casualty Co., 30 Utah 2d 213, 516 P.2d 165 (1973) (Court dismissed claim of widow of judge that heart disease and stroke were covered under

ccidental death policy).

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SERVED a copy of the foregoing brief by mail this 19th day of June, 1978, to the offices of Thomas T. Billings, Esq., 79 South State, Salt Lake City, Utah, 84111.

Gayle J. Fortin